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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MOWAFAG ASAAD,

Defendant and Appellant.

2d Crim. No. B275264
(Super. Ct. No. 16PT-00113)
(San Luis Obispo County)

Mowafag Asaad appeals from an order finding him to be a mentally disordered offender and committing him for treatment to the Department of State Hospitals as a condition of parole. (Pen. Code, § 2962 et seq.)[1] The commitment offense was

[1] All statutory references are to the Penal Code unless otherwise stated.

elder abuse (§ 368, subd. (b)(1)), for which appellant had been sentenced to prison for three years.

Appellant contends that the evidence is insufficient to prove that the commitment offense involved the use of force or violence within the meaning of section 2962, subdivision (e)(2)(P). He argues that the only evidence of force or violence is inadmissible hearsay. We affirm.

Facts

Detective Evan Swearingen testified as follows: In March 2013 he went to an apartment in response to a report that appellant had assaulted his own 78-year-old mother, Helen Sarkees. When he arrived, Sarkees was bleeding from the nose and had bruises on her thigh. She was "distraught" and had "been crying." She "continued to cry" while describing what had happened to her. "She had the appearance of someone who's visibly upset as they are speaking with you."

Swearingen asked Sarkees "how she [had] sustained her injuries." Sarkees replied that, while she was in the kitchen, appellant had called her a "'bitch' and pushed her to the ground." The assault occurred about three hours before Swearingen's arrival.

Discussion

Over appellant's hearsay objection, the trial court admitted Sarkees's statements under the spontaneous statement exception to the hearsay rule. The exception is incorporated in Evidence Code section 1240, which provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made

spontaneously while the declarant was under the stress of excitement caused by such perception."

For a statement to be admissible under this exception, three requirements must be met: "'(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

"Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception. [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 65.) "Because the second requirement [i.e., the statement was made while nervous excitement dominated and the reflective powers were in abeyance,] relates to the peculiar facts of the individual case more than the first or third does [citations], the discretion of the trial court is at its broadest when it determines whether this requirement is met [citation]." (*People v. Poggi*, *supra*, 45 Cal.3d at pp. 318-319.) "Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

Appellant claims that Sarkees's statements did not qualify for admission under the spontaneous statement exception because she made them "well after the alleged attack" and because they were "not 'blurted out' by Sarkees, but instead came in response to questioning by Swearingen." The People therefore failed "to show that the statements were 'spontaneous,' i.e. they were made before there was time or an opportunity for Sarkees to contrive and reflect."

"We cannot say that the trial court abused its discretion in finding that [Sarkees's] statements were spontaneous within the meaning of the exception. [¶] When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. [Citations.] But '[n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*.' [Citation.]" (*People v. Poggi*, *supra*, 45 Cal.3d at p. 319.)

"Here the record supports the finding of spontaneity. First, although [Sarkees] made the statements at issue about [three hours] after the attack, . . . she was still under its influence. Second, . . . she remained excited as she made the statements . . . . Finally, the fact that the statements were delivered in response to questioning does not render them nonspontaneous. . . . [Detective Swearingen's] questions appear to have been simple and nonsuggestive—in substance, 'What happened?' . . . ." (*People v. Poggi*, *supra*, 45 Cal.3d at pp. 319-320.)

Our decision is supported by *People v. Gonzales* (2012) 54 Cal.4th 1234. There, "[i]n response to defendant's showing that [his wife] had been an abusive spouse, the prosecutor called Victor Negrette . . . to testify on rebuttal about an incident in which [wife] told him that defendant had hit her." (*Id*., at p. 1270.) Defendant claimed that the trial court had abused its discretion in admitting wife's out-of-court statement under Evidence Code section 1240 because "there was no evidence showing her statement was made ""before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance."" [Citations.]" In rejecting defendant's claim, our Supreme Court reasoned: "Negrette testified that [wife] was crying when she telephoned and asked him to come and get her, crying when he picked her up from defendant's parents' house, and still upset and crying when she described the fight that day during which defendant hit her. We cannot say the court erred in admitting this testimony. "'[T]he discretion of the trial court is at its broadest" when it determines whether an utterance was made while the declarant was still in a state of nervous excitement. [Citation.]' [Citation.]" (*Id*., at p. 1271.)

Because the trial court did not abuse its discretion in admitting Sarkees's statements under the spontaneous statement exception to the hearsay rule, the evidence is sufficient to prove that the commitment offense involved the use of force or violence within the meaning of section 2962, subdivision (e)(2)(P).

Disposition

The judgment (order of commitment) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Gayle L. Peron, Judge

Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

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